FILE COPY

Office Supreme Court, U. S.
FILED
JAN 14 1931
CHARLES ELMORE CROPLEY
CLERK

No. 563

In the Supreme Court of the United States

OCTOBER TERM, 1930

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

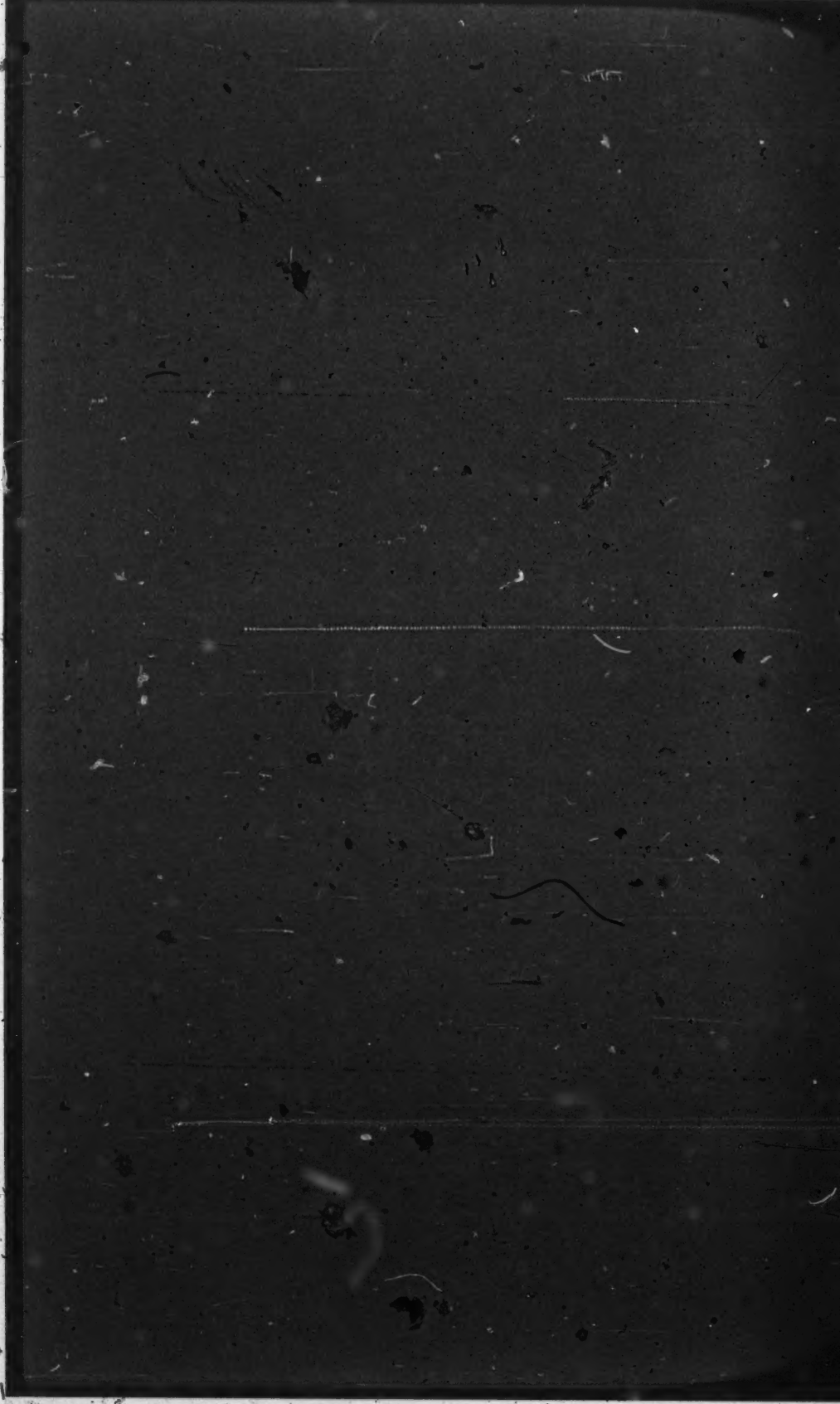
DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

R. M. REDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

JANUARY 14, 1931.



In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 563

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to leave of Court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Eighth Circuit, review of which is sought by this petition, is reported in 43 Fed. (2d) 780, under the title of *Great Northern Railway Company* v. *Delmar Company*. (84–87.) By this decision the lower court sustained an award of reparation made by the Commission in Docket No. 16576, *Delmar Company* v. *Great Northern Railway Company*, 120 I. C. C. 530, (R. 54–62) but in so doing, we submit, construed the tariff involved in such a manner that, if it be regarded as a correct principle of the law, permits or authorizes, in certain in-

stances, the ignoring of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. (U. S. Code, Title 49, Section 4.) Further the ruling of the Court is contrary to the construction which has been followed by the Commission since Section 4 was amended in 1910. It should be understood that our only concern lies with the construction the lower court has placed on Section 4. With the Court's finding that the route over which the shipments moved was an open and unrestricted route, and that, if the carrier intended the rate to apply only over the direct route, it could easily have made a notation in its tariff to that effect, we have no dispute.

FACTS

The pertinent facts are: Numerous shipments of grain originated at points on the line of the Great Northern Railway Company in Minnesota, North Dakota and South Dakota, and were billed originally to Minneapolis, Minn. After delivery at Minneapolis, the shipments were reconsigned by the Delmar Company in the same cars to Superior, Wis., where delivery was made. The entire movement, from points of origin to Superior, was over the rails of the Great Northern. That carrier collected its local rates from origin points to Minneapolis; plus a proportional rate of 6 cents on corn, oats and rye, and 6.5 cents on wheat beyond. The direct route to Superior from the several points of origin, (excepting two, Litchfield and Rogers,

Minn.[1]) is shorter than the route traversed, via Minneapolis, and the combinations of rates exacted were higher than the rates specified in the tariffs for transporting the grain from originating points to Superior. As shown by a table in the record (R. 55) the actual haul from points of origin (again excepting Litchfield and Rogers) to Superior, range from 43.7 miles to 75.7 miles greater than the shortest mileage. In terms of percentage, the actual haul amounts to from 12 to 23 per cent more mileage than that via the shortest route. The plaintiff before the Commission (The Delmar Company) contended, and its contention was adopted by the Commission, that the rates from the points of origin to Superior applied via Minneapolis—although that was the longer distance—because the tariff did not expressly restrict the application of the rate to the shorter and more direct route. Upon this basis the Commission made its award. (R. 54–62.)

Speaking of the rule of construction employed by the Commission and in affirming the action of the District Court sustaining the award, the Circuit Court of Appeals said:

> The rule of construction employed by the Commission is that where there is more than one route from a point of origin to destination, a rate between those points applies to

[1] The Great Northern offers to refund the admitted overcharges on the shipments from Litchfield and Rogers. (R. 55.)

a shipment over any one of those routes unless that route is unreasonably circuitous or unless the carrier has limited the rate in the tariff to a particular route designated therein. This rule has been repeatedly announced and applied by the Commission. * * * Where a departmental ruling or construction has been of long standing and application, it should be accepted unless "plainly wrong." * * * This is particularly true where the subject matter of the regulation requires uniformity and is technical in character, as are railway rate tariffs. * * * The rule of tariff construction involved here is firmly established in statement and application by the Commission (cases first above cited). It should not be set aside or disregarded unless clearly opposed to law or unreasonable. The reasoning creating the rule is that the carrier may, if it has a particular route in mind for a particular tariff, easily express its intention in the tariff; that not to do so leaves the tariff difficult of construction for the shipper and the local agent of the carrier; that in opening the door for more than one meaning the tariff creates a situation where different interpretations by different local agents might result in discrimination between shippers. This reasoning impresses us as being essentially sound. Therefore, the rule of construction of the Commission should be and is approved. (R. 85–86.)

We come now to the contention of the Great Northern Railway that the rule of tariff interpre-

tation should not be adopted in this case because it would result in violations of the so-called long-and-short-haul clause of Section 4 of the Act; that is, because it would make applicable over the circuitous route rates which were lower to the more distant point than rates to intermediate points on the route. The facts of record showed (R. 30–33) that there were intermediate points on the circuitous route to which the rates were higher than the rates made applicable by the rule of tariff interpretation to the more distant point, Superior, Wis. In response to this contention of the carrier the Circuit Court of Appeals said:

> The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act (U. S. C. A. Title 49, Section 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance". As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very

often to the advantage both of the carrier and the shipping public; that there could be no useful purpose in forbidding such a choice and that it was not the intention of the above section to announce a prohibition of this character.

THE STATUTE

The pertinent provision of Section 4 reads:

(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority

conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed.

ARGUMENT

The ruling of the Circuit Court of Appeals that Section 4 of the Interstate Commerce Act has no application in a case of this kind is erroneous.

The carrier urged before the Commission that the tariffs involved should be so construed as to apply only over the short route, and it was pointed out that the application of the rates in question over the longer route would produce violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. In the Commission's report it was, among other things, said:

> Complainant's witness testified that 20 of its shipments were reconsigned and moved through Minneapolis to Superior at the through rate. Whether cars of other shippers moved in like manner under the same rate is not shown. A witness for the Great Northern testified that the 20 cars referred to were permitted to move over the long route at the through rate by error and oversight. It appears that previously it was the custom to apply the through rate only via the direct route and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are

> not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. *Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the interstate commerce act.* [Italics ours.] (R. 57.)

Despite the fact that such interpretation would mean that the carrier was guilty of violating the long-and-short-haul clause of the fourth section, the Commission considered that such interpretation had to be given to its tariffs. After quoting from *Pioneer Lumber Co.* v. *Director General*, 74 I. C. C. 288, involving a closely analogous situation, the Commission said:

> The route from points of origin herein through Minneapolis to Superior was an open route and in the absence of restricted routing it must be found that the through rates to Duluth[*] applied over the route traversed.

The Commission's decision was, then, that the carrier's tariffs had to be interpreted in accordance with the established rule, and that, when so interpreted, they made the lower rate applicable over the circuitous route; from which it followed that the lower rate had to be applied to the shipments, since any departure from applicable tariff

---

[*] Duluth and Superior appear to be one point for rate-making purposes. (R. 32.)

rates is forbidden by Section 6 and by the Elkins Act. At the same time the Commission clearly showed that it was its view that the carrier, by having in its tariffs applicable rates over the circuitous route which were lower to the more distant point than rates to intermediate points on that route, was in violation of the long-and-short-haul clause when shipments moved over that route upon which the lower rates had to be applied. The decision of the lower court is, on the other hand, to the effect that there was no violation of Section 4 involved in the situation. Its holding in this particular follows:

> (4) The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of section 4 of the Interstate Commerce Act as amended (49 USCA paragraph 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distances. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. *The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a dif-*

ference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public, that there could be no useful purpose in forbidding such a choice, and that it was not the intention of the above section to announce a prohibition of this character. [Italics ours.] (R. 86-87.)

As we interpret the Court's decision it holds that where a carrier has two routes between a point of origin and a point of destination and observes the provisions of Section 4 over the shorter of the two routes, it does not violate the provisions of that section if it applies that rate over the longer route and at the same time charges higher rates from and to intermediate points. If this doctrine is sound where the two routes are formed by the lines of the same carriers, it would seem that it could be claimed with equal force that it should apply where the routes are formed by two or more carriers and if such carriers have complied with Section 4 over the direct route, they would not be in violation of that section if they should apply the same rate over a circuitous route and maintain higher rates from and to intermediate points. It is hardly necessary to point out that such a construction of Section 4 would destroy its application in a large majority of the situations in which it is now held to apply.

The ruling of the lower court is contrary to that which has been taken by the Commission since Sec-

tion 4 was amended in 1910,* and seems to us to be contrary to the law involved in the application of that section.

In *United States v. Louisville & Nashville Railroad Company*, 235 U. S. 314, the Court held that after the 1910 amendment to Section 4, the authority of the railroads to primarily determine for themselves the propriety of charging higher rates for the shorter haul than for the longer haul ceased to exist and was vested in the Interstate Commerce Commission.

As we interpret the decision of the Circuit Court of Appeals it is in conflict with that of this Court in *Davis* v. *Portland Seed Company*, 264 U. S. 403, where the Court held that Section 4 of the Act is violated, and the carrier incurs prima facie at least, the penalties prescribed by Section 10, by publishing, without authority from the Commission, a lower rate for the longer haul than that scheduled for the

---

* The 1910 amendment is indicated by the Italics in Section 4 as follows:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter*, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance."

shorter haul of the same kind of property over the same line and in the same direction.

In the case of *Skinner & Eddy Company* v. *United States*, 249 U. S. 557, the Court held that the specific purpose of Section 4 was to prevent discrimination by charging less for the longer than for the shorter haul unless in the opinion of the Commission conditions make such action just. Permission from the Commission is essential to warrant a carrier charging less for the longer than the shorter distance haul, and in the case now under review such permission was not obtained. Compare *Intermountain Rate Cases*, 234 U. S. 476; *Patterson* v. *Louisville & Nashville R. Co.*, 269 U. S. 1.

The question of whether the lower court has correctly interpreted Section 4 is one of importance to railroads and shippers alike, as well as to the Interstate Commerce Commission, and goes beyond the small sum involved in this proceeding. Other cases are now pending before the Commission, both on its informal and formal dockets, the disposition of which would be governed by the case at bar. We believe it is an important question of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

JANUARY 14, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931